STATE OF MICHIGAN
SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Judges Holbrook, McDonald and Saad

CAROL HAYNIE, Personal Representative for the ESTATE OF VIRGINIA RICH, Deceased,

Plaintiff-Appellee,

v

THE STATE OF MICHIGAN, THE MICHIGAN DEPARTMENT OF STATE POLICE,

Defendants-Appellants,

And

DANIEL KECHAK, AND DANIEL PAYNE,

Defendants.
_____/

Supreme Court No. 120426

Court of Appeals No. 221535

Ingham County Circuit Court
File No. 97-87491-NZ
Hon. Lawrence M. Glazer

BRIEF ON APPEAL - APPELLANTS

ORAL ARGUMENT REQUESTED

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Dated: September 9, 2002

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QUESTION PRESENTED FOR REVIEW

I. **Does conduct which, while offensive, is gender neutral and is not sexual in nature, constitute sexual harassment under the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq,* subjecting an employer to potential liability under a hostile work environment claim?**

STATEMENT OF PROCEEDINGS AND FACTS

Virginia Rich and Canute Findsen, both Capitol Security Officers with the Michigan State Police, shot and killed each other while on duty January 17, 1997. (Trial Court Docket Entries R 16, First Amended Complaint, J App, p 33; Court of Appeals Opinion, J App p 1) Plaintiff filed a wrongful death action December 8, 1997 alleging hostile work environment sexual harassment and hostile work environment weight harassment under the Elliott Larsen Civil Rights Act, MCL 37.2101, *et seq,* arising out of decedent Virginia Rich's employment as a Capitol Security Officer with the Michigan Department of State Police and her death on January 17, 1997. (Trial Court Docket Entries, R 1, J App p 3a) The defendants included the Michigan Department of State Police and decedent's supervisors, Daniel Kechak and Daniel Payne. (*Id*)

The complaint alleged decedent, a female, was subjected to work place harassment because of her gender and weight that led to and resulted in the shooting incident and her death on January 17, 1997. The alleged harasser was a co-worker, Canute Findsen. Plaintiff's complaint sought damages based on the alleged harassment decedent suffered prior to her death as well as for her death. (*Id*)

Defendants filed a Motion for Summary Disposition under MCR 2.116(C)(8) as to the hostile work environment sexual harassment claim in *lieu* of answering the complaint. (Trial Court Docket Entries, R11, Motion for Summary Disposition; R 12, Motion for Summary Disposition, J App p 4a) Plaintiff then filed an Amended Complaint. (Trial Court Docket Entries R 16, First Amended Complaint, J App, pp 15a-22a) The First Amended Complaint describes the conduct on which the claim of hostile work environment sexual harassment is based as follows:

> 14. Throughout the course of Decedent Rich's employment, and including, but not limited to within three years of her death, Decedent Rich was sexually harassed by Defendants State of Michigan and Michigan Department of

State Police and their employees, agents and representatives including at least one of Decedent Rich's supervisors.

15. Findsen did not harass fellow male Capitol Security officers as he did the Decedent.

16. Throughout the course of Decedent Rich's employment, and including, but not limited to within three years of her death, Decedent Rich was unlawfully harassed about her weight.

17. The harassment included, but was not limited to, frequent unwelcome comments regarding Decedent Rich's gender, weight and ability as a Capitol Security Officer, which conduct was of an offensive nature directed at Decedent Rich and created an intimidating, hostile and offensive work environment.

18. Findsen, on many occasions made hostile and offensive comments to Decedent Rich regarding her sex, weight and ability as a Capitol Security Officer.

19. Findsen taunted Decedent Rich, on more than one occasion, by showing her a bullet and telling her, by way of [a] note, to "Use it in her daddy's gun."

20. Decedent Rich's father had committed suicide by shooting himself.

21. Findsen knew that Decedent Rich's father had committed suicide. [(Trial Court Docket Entries R 16, First Amended Complaint, J App, pp 17a, 18a)]

The First Amended Complaint also alleges decedent complained to her supervisors regarding Findsen's conduct and no action was taken. [Trial Court Docket Entries R 16, First Amended Complaint, ¶¶ 22, 24, J App p 18a]

Defendants filed a Motion for Summary Disposition of the First Amended Complaint under MCR 2.116(C)(4), (7) and (8).[1] (Trial Court Docket Entries R 19, Motion for Summary Disposition, J App pp 23a-25a) Defendants also filed a Motion for Protective Order seeking to stay discovery while their Motion for Summary Disposition was pending. (Trial Docket Entries

[1] The (C)(4) and (7) aspects of this motion pertained to allegations of negligence contained in the First Amended Complaint. The (C)(8) aspect of this motion pertained to the hostile work environment sexual harassment and weight harassment claims. (Motion, J App pp 23a-25a)

R 21, Miscellaneous Motion, J App p 5a) These motions were heard and decided April 8, 1998. (Tr, p 1, 22, 23, J App pp 38a, 59a, 60a)

At this hearing, the trial court asked plaintiff's counsel about the pleading requirements and factual allegations specific to the sexual harassment claim. The following exchange occurred:

> THE COURT: No, what you have to state sufficient facts to state a claim of sexual harassment. That's what you have to do and I don't think you disagree with that.
>
> MR. BOOG: I agree with that.
>
> THE COURT: And my question is, what facts have you stated in your Complaint that are sexual harassment?
>
> MR. BOOG: We have stated that he did not – Findsen did not want female police officers or security guards in the State Police. That this harassment to her was based on her sex, it was tortured sex –
>
> THE COURT: It was what?
>
> MR. BOOG: It was torture because of her sex and weight. He didn't feel that she met the standards that he felt that a State Police officer should have.
>
> **THE COURT: So you are not asserting that Findsen or anybody else in the State Police made a request for sexual favors to her?**
>
> **MR. BOOG: We are not aware of that.**
>
> **THE COURT: You are simply saying that Findsen made life unpleasant for her by doing a number of things or saying a number of things, but not that any of these things were sexual in nature?**
>
> **MR. BOOG: They were based –**
>
> **THE COURT: Not that they were – not gender motivated, but whether or not they were sexual in nature.**
>
> **MR. BOOG: They were not sexual in nature.**
>
> **THE COURT: You are saying they're gender motivated, but not sexual in nature?**

MR. BOOG: **That's correct.** [Tr, pp 18, 19, J App pp 55a, 56a]. (Emphasis added.)]

The trial court then issued its decision with respect to plaintiff's hostile work environment sexual harassment claim:

> THE COURT: Be seated. Now that Plaintiff's counsel has clarified for me the theory of this action, I am in a position to decide whether the pleadings state a cause of action on behalf of the Plaintiff.
>
> As I understand it, Plaintiff's theory is that the deceased was subjected to a number of unkind, nasty, hostile statements and activities, some of which may have been partially -- I should say that may have been partially motivated by the fact that she was a female, but none of them were sexual in content.
>
> The Radtke versus Everett case decided by the Supreme Court in 1993 states that there are, quote, "five necessary elements to establish a prima facie case of a hostile work environment. Number one, the employee belonged to a protected group," close quote. That's alleged here. Number two, quote, "the employee was subjected to communication or conduct on the basis of sex," close quote. I take it that sex in that context to mean gender. That's alleged here. Number three, quote, "the employee was subjected to unwelcome sexual conduct or communication," close quote. **That is not alleged here.** Number four, quote, "the unwelcome sexual conduct or communication was intended to or, in fact, did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment, " close quote. **That is not alleged here, *and* the fifth is not here, respondeat superior.** This standard is found at pages 382 and 383 of the Radtke versus Everett opinion.
>
> It is my understanding that all of these must be alleged in order to bring an action under the Elliott-Larsen Act for hostile work environment sexual harassment and some of those elements have not been pled and, therefore, the motion must be granted. [Tr, pp 22, 23, J App pp 59a, 60a. (Emphasis added)]

The trial court was not prepared to address the hostile work environment weight harassment claim at the April 8, 1998 hearing and instructed defense counsel to refile the motion with respect to that claim. (Tr, p 24, J App p 61a) The trial court then granted defendant's Motion for Protective Order stating, "I am going to Order that no discovery take place until I have heard the other motion." (Tr, p 25, J App p 62a) Separate Orders dismissing the sexual

harassment claim and staying discovery until further order of the trial court were then entered. (Trial Court Docket Entry R 30, 4/20/98 Order, J App 65a; Trial Court Docket Entry R 33, Order, J App 6a)

Defendants' Third Motion for Summary Disposition was then filed and heard June 24, 1998. (Trial Court Docket Entry R 31, Motion for Summary Disposition, J App, p 6a; Trial Court Docket Entry, R 32 Motion for Summary Disposition, J App 6a) The trial court granted the motion as to the individual defendants dismissing the remaining claims against them but denied the motion as to the Michigan State Police. (Trial Court Docket Entry 139, July 8, 1998 Order, J App pp 68a, 69a)

Discovery then proceeded in the case on the remaining hostile work environment weight harassment claim. After the close of discovery, plaintiff stipulated to voluntarily dismiss the remaining weight harassment claim without prejudice. An Order dismissing the claim without prejudice and resolving the matter at the trial court level was entered July 22, 1999. (Trial Court Docket Entries R 139, Order, J App p 13a) A timely Claim of Appeal from the April 20, 1998, April 24, 1998 and July 9, 1998 Orders was then filed by plaintiffs. (Trial Court Docket Entries R 143, Claim of Appeal, p 13a)

On appeal, plaintiff argued that facts establishing conduct of a sexual nature need not be pleaded to properly state a claim of hostile work environment sexual harassment under the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq,* because both state and federal precedent recognize a claim of hostile work environment based on gender discrimination. Plaintiff then argued that sufficient facts had been pleaded to establish a claim of gender discrimination/hostile work environment and the trial court erred in granting defendants' motion on this claim. (Court of Appeals Docket Entries, R 10, Appellant's Brief, J App pp 80a, 85a-84a)

The Court of Appeals held that a claim of gender discrimination hostile work environment was in fact recognized under the Michigan Civil Rights Act and reversed the trial court's dismissal of that claim as to the Michigan State Police. The Court of Appeals concluded that "plaintiff was not required to allege that the hostile comments were overtly sexual in nature under *Koester [v City of Novi,* 458 Mich 1; 580 NW2d 835 (1998)]" and that "...plaintiff set forth a prima facie hostile work environment sexual harassment claim." (Opinion p 4, J App p 103a) The claim was then remanded to the trial court for further proceedings. (Opinion p 6, J App p 105a)

Defendant Michigan State Police then filed an Application for Leave to Appeal with this Court, which was granted July 2, 2002.

ARGUMENT

I. Conduct which, while offensive, is gender neutral and is not sexual in nature, does not constitute sexual harassment under the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq,* subjecting an employer to potential liability under a hostile work environment claim.

A. Standard of Review

The grant or denial of summary disposition under MCR 2.116(C) (8) is reviewed *de novo. Koenig v City of South Haven,* 460 Mich 667, 674; 597 NW2d 99 (1999). The court must determine whether the opposing party's pleadings allege a prima facie case. In reviewing a motion under MCR 2.116(C)(8), the court does not act as a fact finder but "accepts as true all well-pleaded facts." *Abel v Eli Lilly & Co,* 418 Mich 311, 324; 343 NW2d 64 (1984). Where the allegations fail to state a valid claim, summary disposition is proper. *Radtke v Everett,* 442 Mich 368, 373, 374; 501 NW2d 155 (1993).

B. Argument

The trial court, relying on the clear, unambiguous language of the statute, correctly concluded that the First Amended Complaint in this case failed to state a claim as it did not plead any facts establishing discrimination based on sexual harassment because it did not identify any unwelcome sexual advances or other verbal or physical conduct or communication of a sexual nature. The trial court also correctly concluded that further amendment of the complaint would be futile based on plaintiff counsel's admission that no such conduct existed.

The Court of Appeals reversed the trial court's dismissal of this hostile work environment sexual harassment claim against the Michigan State Police based in part on its reading of this Court's decision in *Koester v City of Novi,* 458 Mich 1; 580 NW2d 835 (1998). The Court of Appeals concluded:

> This Court addressed this issue in *Koester v City of Novi,* 213 Mich App 6523; 540 NW2d 765 (1995) in which plaintiff, a patrol officer, was subjected to the following comments about her pregnancy, ...
>
> This Court held that the CRA specifically defines sexual harassment "as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature." *Id.* at 668-669. The Court further held that "conduct or communication based on gender is inconsistent with the examples given in the statute – sexual advances, sexual favors – that all concern overtly sexual, as opposed to gender-based conduct." *Id.* at 669-670. Because the plaintiff failed to show that plaintiff's superiors made overtly sexual comments, this Court ruled that the trial court should have granted defendants' motions for summary disposition and directed verdict on plaintiff's sexual harassment claim. *Id.*
>
> Our Supreme Court reversed this Court's ruling and held that the unwelcome sexual conduct or communication "need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Koester v City of Novi,* 458 Mich 1, 15; 580 NW2d 835 (1998), quoting *Oncale v Sundowner Offshore Services, Inc,* 523 US 75, 80; 118 S Ct 998; 140 L Ed 2d 201 (1998). Accordingly, the Court ruled that "[a] trier of fact may find sexual harassment when 'the harasser is motivated by general hostility to the presence of women in the workplace.'" *Koester, supra,* at 15, quoting *Oncale, supra,* at 80. Thus, the Court ruled that a plaintiff may prove a claim of hostile work environment based on sexual harassment if the employer's comments are gender-motivated, but not overtly sexual. [Opinion, p 3; App, p 102a]

The Court of Appeals erred in its interpretation and application of this Court's decision in *Koester, supra.* This decision which reverses the trial court and recognizing a "gender-motivated" sexual harassment claim the Elliott-Larsen Civil Rights Act is contrary to the clear, unambiguous language of the statute and the analysis given it by the *Koester* Court.

1. Statutory Language

The Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq,* prohibits discrimination because of sex by an employer. Discrimination because of sex is defined in § 103 of the Act:

> (i) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

(i) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.

(ii) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment, public accommodations or public services, education, or housing.

(iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [MCL 37.2103(i)]

The conduct in the first two cited subsections is usually referred to as *quid pro quo* sexual harassment. The conduct described in the third cited subsection is referred to as hostile work environment sexual harassment. *Radtke v Everett*, 442 Mich 368, 381; 501 NW2d 155 (1993). Plaintiff's complaint is premised on this latter theory of discrimination. The elements of a *prima facie* case of hostile work environment sexual harassment are:

1) the employee belonged to a protected group;

2) the employee was subjected to communication or conduct on the basis of the protected status;

3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status;

4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and,

5) *respondeat superior.*

Quinto v Cross & Peters, 451 Mich 358, 368; 547 NW2d 314 (1996); *Radtke*, 442 Mich at 382.

Where the hostile work environment claim is based on sexual harassment, the unwelcome conduct or communication must include "sexual advances, requests for sexual favors, and other

verbal or physical conduct or communication of a sexual nature . . . ." *Radtke v Everett,* 442 Mich at 382; *Quinto v Cross & Peters**Error! Bookmark not defined.**,* 451 Mich at 370, 371; MCL 37.2103(i). The language of the statute is clear and unambiguous and, unlike federal precedent, requires verbal or physical conduct of a "sexual nature" to make out a claim of hostile work environment sexual harassment.

The Legislature is presumed to understand the meaning of the language it enacts into law and statutory analysis must therefore begin with the wording of the statute itself. *Robinson v City of Detroit,* 462 Mich 439, 459; 613 NW2d 307 (2000); *Carr v General Motors Corp,* 425 Mich 313, 317; 389 NW2d 686 (1986). Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. *Robinson, Id; University of Michigan Board of Regents v Auditor General,* 167 Mich 444, 450; 132 NW 1037 (1911). Where the language of the statute is clear and unambiguous, the Court must follow it. *Robinson, Id; City of Lansing v Lansing Twp,* 356 Mich 641, 649; 97 NW2d 804 (1959). Here, the Legislature specifically defined "sexual harassment" as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature." MCL 37.2102(i). The Court of Appeals here ignored the clear, unambiguous language of the statute and misread *Koester* as doing the same.

2. Application of the *Koester* decision

The Court of Appeals' Opinion evidences an impermissibly overbroad reading of *Koester, supra,* and demonstrates the need for this Court to clarify its decision to the extent it is being read as adopting federal precedent and recognizing a "gender-motivated" hostile work environment claim despite the clear, unambiguous language of the Elliott-Larsen Civil Rights Act.

Without question, our appellate courts have relied on federal precedent for guidance when analyzing claims under the CRA. See, for example, *Summer v Goodyear Tire Co,* 427 Mich 505, 525; 398 NW2d 368 (1986); *Civil Rights Dep't ex rel Cornell v Edward W Sparrow Hosp Ass'n,* 423 Mich 548, 559; 377 NW2d 755 (1985). However, contrary to the Court of Appeals' interpretation, *Koester* does not adopt federal precedent in interpreting statutory language at issue in that case. A fair reading of this decision requires the conclusion that *Koester* acknowledges federal precedent on the issue of gender-motivated harassment but does not adopt that precedent in support of a similar claim under the CRA. *Koester,* 458 Mich at 11-15. Rather, *Koester* relies on the language of the statute itself to conclude that statements and comments about a woman's pregnancy are sexual in nature and, thus, support a claim of hostile work environment sexual harassment. Specifically, the Court noted:

> It is not coincidental that the Michigan Legislature amended the Civil Rights Act in 1978 to state that "sex" includes pregnancy, shortly after Congress amended title VII to include pregnancy. Indeed, our legislative history of the Civil Rights Act reveals that the section stating that "sex" includes pregnancy was added in specific response to the United States Supreme Court decision in 1976 stating otherwise. The 1978 House Legislative Analysis states that "[c]larification is needed regarding pregnancy benefits because of a 1976 U.S. Supreme Court decision [*General Electric Co v Gilbert, supra]* concerning pregnancy benefits . . . ." Fourth Analysis, HB 5257 May 22, 1978. As the legislative history indicates, as of 1978 at least twelve other states clarified their human rights statutes to include pregnancy in response to the Court's ruling.
>
> **Under the express language of the Michigan statute**, analogous federal law, and the legislative history of the Civil Rights Act, we hold that sexual discrimination includes harassment on the basis of a woman's pregnancy. [*Koester,* 458 Mich at 16. (Emphasis added.)]

Unlike *Koester,* no express language exists in the CRA which defines gender discrimination as a viable cause of action. Further, the Legislature has not amend the CRA to align the statute's definition of sexual harassment with federal law and case precedent. *Koester* does not adopt federal precedent with respect to this issue. Rather, as noted above, its relies on

the specific language of the CRA which defines "sex" as including pregnancy as the underlying basis for its decision. Contrary to the Court of Appeal's reading, *Koester* does not recognize a "gender-motivated" cause of action under the CRA as the express language does not encompass such a claim.

The Court of Appeals' decision here clearly justifies Justice Weaver's warning in her *Koester* dissent.

> Unlike title VII, the Michigan Legislature chose to separately and more specifically define sexual harassment. This definition evinces an intent to address a form of misconduct distinct from sex discrimination and should control the resolution of this issue. Instead, the majority subverts the CRA definition of sexual harassment, thereby subverting the Legislature's intent. [*Koester*, 458 Mich at 24].

The Court of Appeals, while erroneous, has read *Koester* as doing just that, expanding the definition of sexual harassment beyond the express and unambiguous language of the statute. The Court of Appeals' interpretation of *Koester* as recognizing a "gender-motivated" cause of action under the CRA clearly requires reversal. The conduct at issue here does not involve sexual references, requests for sexual favors or relate in any way to sex. Indeed, plaintiff repeatedly refers to this claim as gender discrimination. (Appellant's Brief on Appeal, pp 10-14, J App 90a-94a)

Purporting to apply *Koester,* the Court of Appeals expanded the concept of sexual harassment beyond that specifically defined by the Legislature to include plaintiff's position of gender harassment. Under this gender harassment theory the focus then becomes the genders of the person to whom the conduct is directed and of the person engaged in the conduct rather than the type or nature of the conduct as intended by the Legislature. In other words, under the Court of Appeals' logic, any conduct directed at a female employee by a male employee that she finds offensive would support a discrimination claim against the employer under the hostile work

environment theory. Such an application not only constitutes judicial amendment of the clear language of the statute, it exposes employers to potential liability for conduct and opinions of which they have no knowledge and lack any ability to control. Every personality conflict and every petty workplace squabble has the potential of exposing the employer to liability under this expansive application of the Civil Rights Act.

Such an application ignores the legislative intent of the statute as garnered through the clear, unambiguous language used to define sexual discrimination, sexual harassment and other specifically prohibited conduct.

Applying the rules of statutory construction cited above to this case, a gender harassment cause of action is not viable under the CRA. The Act clearly and unambiguously defines "discrimination because of sex" to include "sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature." MCL 37.2101(i). Plaintiff admitted no such conduct was involved in this case. (Tr, pp 17-19, J App pp 54a-56a) Applying the clear, unambiguous language of the statute to the pleadings in this case requires the conclusion that plaintiff's complaint fails to state a claim upon which relief may be granted as no claim of sexual harassment was plead.

This Court now has the opportunity to clarify its ruling in *Koester* and clearly state that based on the specific language of the CRA, a "gender-motivated" cause of action is not viable. A clear ruling on this issue will avoid the misapplication of *Koester* in the future and leave amendment of the statute to the Legislature should it choose to take further action.

CONCLUSION

The conduct at issue in this case, while offensive, is not sexual in nature under the terms of the statute and does not give rise to a hostile work environment sexual harassment claim against the employer, Michigan State Police. The trial court correctly applied the language of the statute in concluding plaintiff had failed to state a claim upon which relief could be granted. It was apparent from counsel's admission at the motion hearing that any amendment of the pleadings to address the pleadings' deficiencies would be futile. Thus, dismissal of the claim was proper.

The Court of Appeals erroneously reversed the trial court relying on *Koester v City of Novi,* 458 Mich 1; 580 NW2d 835 (1998), a decision which this court should clarify to avoid any future misapplication of this Court's holding in that case. The Court of Appeals improperly read *Koester* as recognizing a generic "gender hostility" cause of action under the Elliott-Larsen Civil Rights Act, contrary to the specific language of the statute as the conduct on which this claim is based is not of a sexual nature and does not otherwise fall within the conduct prohibited by that Act.

RELIEF SOUGHT

Appellants ask this Court to reverse that portion of the Court of Appeals decision reversing the circuit court and reinstate the grant of summary disposition and dismissal of the hostile work environment sexual harassment claim against the Michigan State Police.

Respectfully submitted,

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RELIEF SOUGHT

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Respectfully submitted,

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PROOF OF SERVICE

Wendy Todd, being duly sworn, deposes and says that on September 10, 2002, she did serve Defendants-Appellants, State of Michigan and Michigan State Police's Brief on Appeal-Oral Argument Requested and Joint Appendix upon counsel of record by first class mail addressed as follows:

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